No. 83-5701

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JAMES ADAMS,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Sixth and Fourteenth Amendments permit the denial of a claim of ineffective assistance of counsel in a capital sentencing trial -- on the basis of a presumption that counsel provided effective assistance -- where the record shows that counsel decided: (a) to present no evidence of mitigating circumstances, despite the available but uninvestigated evidence of very substantial mitigating circumstances; (b) to inform the jury and the court in the sentencing trial that "[w]e [the defense] have no evidence"; and (c) to present a closing argument which conceded the persuasiveness of the reasons for imposing death, provided no reasons for imposing life instead of death, and apologetically asked the sentencer to "consider" imposing life despite there being no reason he could think of for doing so.

2. Whether the sentencing court's application of non-premeditated felony murder as an aggravating circumstance justifying the imposition of the death penalty conflicts with the Court's recent pronouncement in Zant v. Stephens, ___U.S.___, 103 S.Ct. 2733, 2747 (1983), prohibiting capital sentencing tribunals from treating as aggravating "conduct that actually should militate in favor of a lesser penalty."

3. Whether the Florida courts' procedural default rule, which is haphazardly applied in capital cases, can serve as an "independent and adequate state procedural ground" under Wainwright v. Sykes, 433 U.S. 72 (1977) and thus bar federal habeas corpus review of capital sentencing issues.

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JAMES ADAMS,
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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, JAMES ADAMS, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed July 18, 1983. Rehearing was denied on September 12, 1983.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 709 F.2d 1443 (11th Cir. 1983), and is set out at pages 1a-8a of the Appendix.[1] The order denying rehearing is set out at App. 9a.

JURISDICTION

The judgment and opinion of the court of appeals were filed on July 18, 1983, and petitioner's timely petition for rehearing was denied on September 12, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the sixth amendment to the Constitution which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... and to have the assistance of counsel for his defense;

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[1] Citations to the Appendix accompanying this petition are designated App. ___.

the eighth amendment to the Constitution which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the fourteenth amendment to the Constitution which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law ....

It also involves Section 921.141, Florida Statutes (1973), which is set out at App. 10a-11a.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Petitioner was indicted for first degree murder in St. Lucie County, Florida on December 11, 1973, solely upon a theory of felony murder and not upon a theory of premeditated intent. (R. 6-7)[2] He was thereafter convicted of first degree felony murder on March 15, 1974, and was immediately thereafter sentenced to death.

Petitioner appealed his conviction and sentence to the Supreme Court of Florida, and both were affirmed. Adams v. State, 341 So.2d 765 (Fla. 1976) (Boyd and Hatchett, J.J., dissenting), cert. denied, 434 U.S. 878 (1977). [This opinion is set out at App. 12a-17a.]

Thereafter, pursuant to this Court's decision in Gardner v. Florida, 430 U.S. 349 (1977), petitioner filed an application for relief in the Supreme Court of Florida. The application was

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2 References to the record in the courts below will be abbreviated as follows:

"T," the transcript of the trial in the Circuit Court of the Nineteenth Judicial Circuit of Florida, March 12-15, 1974;

"R," the record on direct appeal to the Supreme Court of Florida from the judgment of conviction of first-degree murder and sentence of death;

"PCT," the transcription of the evidentiary hearing on petitioner's motion for post-conviction relief in the state trial court, January 25, 1980.

denied. Adams v. State, 355 So.2d 1205 (Fla. 1978), cert. denied, 439 U.S. 947 (1978). [This opinion is set out at App. 18a-19a.]

Petitioner then commenced and prosecuted state post-conviction and federal habeas corpus proceedings. His motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850 was denied by the Circuit Court in St. Lucie County, and that order was affirmed by the Supreme Court of Florida. Adams v. State, 380 So.2d 423 (Fla. 1980) [This opinion is set out at App. 20a-22a.] He then filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. Following the denial of this petition in an unreported order and opinion [which is set out at App. 23a-32a], petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. On July 18, 1983, a panel of the Eleventh Circuit affirmed the District Court's denial of habeas corpus relief. Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983) [App. 1a-8a].

On August 8, 1983, a timely petition for rehearing and suggestion for rehearing en banc was filed in the Eleventh Circuit concerning the panel opinion. Rehearing was denied by order, dated September 12, 1983. (App. 9a)

B. Statement of Material Facts

The evidence at trial showed that on the morning of November 12, 1973, Edgar Brown was found injured in his home (T. 441). Apparently the perpetrator had entered the residence unarmed while no one was in the house (T. 267, 324-325, 442-446). Sometime later the deceased returned home and discovered the perpetrator (T. 241, 324-325). There was a struggle, during which the deceased received injuries from a fireplace poker kept in the house. He died the next day.

The State presented evidence that a car like that owned by Mr. Adams was seen at the deceased's home the morning the crime occurred (T. 325, 358). Mr. Adams' car was located later that day at a paint and body shop where he had left directions that it be repainted (T. 524), a course he had been considering months earlier (T. 865, 930). Mr. Adams established that his vehicle had been driven the morning of the offense at about 10:00 or

10:15 a.m., one-half hour before the assault on the deceased (T. 352), by his friend, Vivian Nickerson, and another man, William Crowley (T. 861, 862, 938). The trunk of the car was defective and could be opened without a key (T. 881).

The only State witness who saw a man leave the Brown house did not identify Mr. Adams even though the witness conversed with the person he saw. In fact, he said that person was blacker than Mr. Adams (T. 366). The witness had heard a woman's voice before seeing the man (T. 365).

Both the State and the defense presented evidence showing that on November 12, 1973, Mr. Adams was in the process of moving back to his wife's house from a friend's house where he had been staying during a short separation (T. 634). Mr. Adams testified that he transferred his belongings from the friend's house to his car and then to his wife's car (T. 865). In his wife's car, which was searched after Mr. Adams was arrested on the instant charge, were found several items identified as belonging to Edgar Brown or members of his family (T. 648, 808, 810, 812, 816, 822). Mr. Adams had approximately $200 on his person at the time of his arrest on November 12, 1973 (T. 586), although State witnesses testified that the deceased always carried between $700 and $1000 cash, which was missing when he was found (T. 815).

Throughout pre-trial and trial proceedings, Mr. Adams consistently denied any involvement in the homicide of Edgar Brown. During the guilt-innocence trial, he testified in great detail concerning his activities during the time of the homicide, none of which put him anywhere near the Brown residence (T. 837-927). Prior to the imposition of his death sentence, after the trial judge asked Mr. Adams if he had anything to say, Mr. Adams responded, "All I would like to say one thing, Mr. Brown's murderer is still out there. I didn't do it." (T. 1192)

At the close of the evidence in the guilt-innocence trial, prior to closing arguments, a charge conference was held. During this conference, both the trial judge and the prosecutor agreed that there was "no premeditation involved in this thing." (T. 1004) The prosecutor further declared that this was a case

"where premeditated intent or design is not involved." (T. 1006) Accordingly, the trial judge determined that he would instruct the jury only on felony murder. (T. 1015)

Thereafter, the prosecutor argued to the jury that

> the issue in this case is one thing. It is for you to determine whether or not James Adams, while he was engaged in the perpetration or the attempt to perpetrate a robbery did kill Edgar Brown here in St. Lucie County on November 12, 1973. I submit to you that that is the sole issue for you to decide.

(T. 1050) Consistent with the determination in the charge conference and with the prosecutor's argument, the Court then instructed and subsequently reinstructed the jury that it could return a verdict of guilty of first degree murder only upon a finding that petitioner had killed the deceased during a robbery or attempted robbery "even though there is no premeditated design or intent to kill." (T. 1126, 1145)

At the penalty trial, the State adduced evidence that Mr. Adams had been convicted of rape in 1963 in Tennessee, and was sentenced to 99 years in prison for that charge. Also placed in evidence was testimony that Mr. Adams escaped from prison in 1972 (T. 1163-1174). The sole witness to these facts was Sheriff Cribbs of Dyer County, Tennessee, who was permitted to identify Mr. Adams using pictures and fingerprints taken at a Tennessee police station in 1956.

On behalf of Mr. Adams at the penalty trial, defense counsel said, "We have no evidence." (T. 1175) The only other presentation by the defense during the penalty trial consisted entirely of the following one minute closing argument:

> May it please the Court. Ladies and gentlemen, you have heard all the evidence and you have found James Adams to be guilty of first degree murder.
>
> I understand how Mrs. Brown felt during her testimony, recalling the testimony in which she saw her husband lying there in the condition he was. I understand Mr. Brown's reputation in the community. I think you understand the situation. You have heard all the evidence.
>
> The only thing we can ask you here today is to consider whether or not the death penalty is appropriate in this case. Now, the Florida Legislature has declared in its infinite wisdom that the death penalty is a proper judgment in some cases, and the State is allowed to introduce evidence to show why it believes that here today is a case where you could

> appropriately advise the Court that this man should be put to death and yet I find it necessary to ask for you to consider that you save his life in spite of all this and let this man live, for no other reason than that he is a man. Thank you.

(T. 1179-1180)[3]

At the hearing on Mr. Adams' motion to vacate, two witnesses testified. The first was Bruce Wilkinson, who had served as co-counsel in a support capacity during Mr. Adams' trial and who had represented Mr. Adams in subsequent clemency proceedings. Mr. Wilkinson testified that the trial judge told Mr. Adams' trial attorney during an unreported conference in chambers that he was limited in the presentation of mitigating circumstances to those enumerated in the statute and that nothing else would be allowed (PCT. 14). Trial counsel had confirmed Mr. Wilkinson's recollection in a conversation with the latter (PCT. 14). Mr. Wilkinson was thoroughly familiar with the trial file, which detailed substantial investigation as to the guilt phase of Mr. Adams' trial (PCT. 14-15, 22-24). But there was no specific delineation of any matter which was considered for the penalty phase, even though Mr. Wilkinson readily discovered, in his own investigation for the clemency proceedings, evidence which was available at the time of trial, which could have been presented in mitigation of sentence, but which, inexplicably, was not. This evidence included the circumstances of Mr. Adams' background: that he was one of eleven children of sharecroppers in rural Tennessee, who was required to begin working at about 10 years of age to help support the family. He received little or no education, since he was allowed to attend school only when it rained, and was consequently illiterate. When Mr. Adams was 16, his father died and he became the head of the household, working two or three jobs simultaneously to support his mother, and the other children who remained at home. He continued working until he was charged with rape when he was 28 (PCT. 30-31). Also available at the time of trial was local information that Mr.

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[3] Not surprisingly, the jury thereafter recommended (T. 1188), and the judge imposed (T. 1193), a death sentence. Among the findings relied upon by the judge in imposing death was the commission of the murder in the course of the commission of a robbery (R. 85).

Adams was active in the church and counselled children (PCT. 25, 31), and evidence that Mr. Adams had a good employment record while in Fort Pierce (PCT. 23).

Moreover, although Mr. Adams had testified at trial in response to the State's cross-examination that he had "five or more "convictions (T. 926), Mr. Wilkinson readily discovered that only the 1962 rape conviction was even superficially legal (PCT. 15, 16). Two other misdemeanor convictions--all that there was record of--had been uncounselled and there had not been an offer of counsel. And one of those convictions was for the 1956 larceny of a pig Mr. Adams and his brother had taken for food (PCT. 16, 18, 26). [The trial judge had relied upon Mr. Adams' erroneous testimony in justifying the sentence of death (R. 84).]

In addition Mr. Wilkinson testified that he discovered that Mr. Adams' rape trial was before a jury which may well have been the product of racially selective procedures. In any event, all the jurors were white, and the courtroom was racially segregated; Mr. Adams' family had to sit in the balcony. Mr. Adams himself was shackled throughout the trial, although there was no indication he acted in a way which would have justified such a prejudicial treatment, which was apparently standard procedure (PCT. 20-21).

Finally, Mr. Wilkinson determined that Mr. Adams' prison record in Tennessee was excellent: indeed, he had been on trustee status assigned to a women's correctional institution. There was no violence involved in his escape, which occurred when he drove away in a State vehicle to which he had free access because of his status. (PCT. 27)

Also testifying at the hearing was Richard Lubin, a criminal defense attorney with substantial experience in capital trials, who opined that Mr. Adams' defense counsel at trial did not render effective assistance because of his failure to adequately investigate and prepare mitigation for the penalty phase, coupled with his totally ineffectual closing argument and his failure to challenge the rape conviction, explain Mr. Adams' criminal record, or object to certain inflammatory remarks made by the prosecutor during his closing summation (PCT. 54, 62-63, 70-71).

With no further hearing having been held in federal court, it is upon the foregoing facts that the death sentence and death sentencing procedure for James Adams have been approved.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED IN THE COURTS BELOW

1. Mr. Adams first raised his claim that he had been denied effective assistance of counsel in his sentencing trial in state post-conviction proceedings pursuant to Fla.R.Crim.P. 3.850. On the appeal to the Florida Supreme Court in these proceedings, the Court rejected Mr. Adams' claim that counsel was ineffective for his failure to investigate and present available mitigating evidence on the following basis: "it is our view that the mitigating and ameliorating evidence suggested in appellant's allegations would not have affected the sentence, and was, in fact, already negated to a large extent by the appellant's own testimony during the guilt-innocence portion of the trial." (App. 22a) Mr. Adams raised the same claim in his federal habeas petition [¶12(d) of the petition], and the district court rejected the claim for essentially the same reason as the Florida Supreme Court. (App. 30a) Finally, Mr. Adams presented this claim as one of the issues on his appeal to the Eleventh Circuit. The Eleventh Circuit's disposition of the claim is discussed at length in the "Reasons..." section of the petition.

2. Mr. Adams first raised on direct appeal to the Florida Supreme Court his claim that the felony murder basis of his conviction entitled him to have the non-intentional-homicide finding associated with that conviction considered as mitigating against death. (Appellant's Second Supplemental Brief, Case No. 45,450, at 8-13)[4] The Florida Supreme Court nonetheless approved, without discussion, the consideration of the felony murder aspect of the homicide as an aggravating circumstance. (App. 16a) Mr. Adams raised the same claim in his federal habeas corpus petition [¶12(a) of the petition], and the district court rejected the claim:

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[4] In the state courts and the federal courts--until this Court's decision in Zant v. Stephens, ___U.S.___, 103 S. Ct. 2733 (1983) -- Mr. Adams raised this issue primarily as a death-is-disproportionate issue because of the non-intentional aspect of the murder. Only after Zant did he include expressly the claim that the felony murder should have been considered a mitigating circumstance. However, the argument--that "pure" felony murder is a mitigating circumstance instead of an aggravating circumstance -- was contained within all of his "death-is-disproportionate" presentations of the issue. Thus, he submits that the issue as framed is properly raised herein.

> Petitioner's contention that the death penalty is being imposed as punishment for a non-deliberate killing in this case is erroneous. The deliberateness of the act is presumed from the evidence at petitioner's trial that the beating that resulted in the victim's death occurred during the perpetration of a robbery. The felony murder rule simply obviated the necessity of proving the defendant's state of mind.

(App. 24a) Finally, Mr. Adams presented this claim as one of the issues on his appeal to the Eleventh Circuit. The Eleventh Circuit held that death is not disproportionate for the actual killer in a felony murder homicide, without regard to whether the killer actually intended to kill. (App. 4a-5a) On rehearing, Mr. Adams raised the Zant aspect of this issue--that even if death is not disproportionate for a "pure" felony murder (one for which the conviction is solely for felony murder, not for both premeditated and felony murder), the lack of actual intent to kill must at least be considered as mitigating and not aggravating -- and rehearing was denied without opinion. (App. 9a)

3. Mr. Adams first presented his claim that the trial judge improperly limited the consideration of mitigating factors to those enumerated in the death penalty statute in his state post-conviction proceedings. On the appeal to the Florida Supreme Court in these proceedings, the court focused only on that aspect of this claim regarding the trial judge's exclusion of potential evidence of nonstatutory mitigating factors. (App. 21a) In his federal habeas corpus petition, Mr. Adams raised both aspects of this claim again--arguing that his Eighth and Fourteenth Amendment rights were violated by both the exclusion of potential evidence of nonstatutory mitigating circumstances and the restriction of the jury's consideration of mitigating factors, to those enumerated in the statute, in the penalty trial charge to the jury [¶12(b)(3) of the petition]. Although the state argued that review of the jury instruction aspect of this issue was barred under Wainwright v. Sykes, 433 U.S. 72 (1977)--by virtue of no objection having been made to the instructions at trial--the district court reached the merits: "The judge tracked the language of the statute in charging the jury, and did not instruct the jury not to consider other nonstatutory mitigating

factors." (App. 26a) Mr. Adams raised this issue on his appeal to the Eleventh Circuit, but the court refused to review the merits of the issue because of the procedural default in raising the issue. (App. 6a-7a) Prior to the publication of the Eleventh Circuit's opinion, however, Mr. Adams had sought the court's leave to file a supplemental brief arguing that Florida's procedural default rule was so inconsistently applied to the state court's review of capital sentencing issues that it could not bar federal review under Sykes. Although the motion was disallowed, the court did permit this brief to be considered in connection with Mr. Adams' petition for rehearing. Rehearing, however, was denied without opinion. (App. 9a)

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE THE PROPER ROLE OF THE PRESUMPTION OF ATTORNEY COMPETENCE IN THE ANALYSIS OF A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN A CAPITAL SENTENCING TRIAL, BECAUSE THAT PRESUMPTION IS BEING UTILIZED TO DENY CLAIMS OF INEFFECTIVE ASSISTANCE--EVEN THOUGH DEFENSE COUNSEL PRESENTED NO MITIGATING EVIDENCE (DESPITE THE AVAILABILITY OF SUBSTANTIAL MITIGATING EVIDENCE) AND ARGUED IN EFFECT THAT DEATH WAS APPROPRIATE--SOLELY FOR THE REASON THAT FORMER DEFENSE COUNSEL HAS NOT (OR WILL NOT) ADMIT A FAILURE TO INVESTIGATE OR OTHER DEFAULT IN HIS DUTY OF REPRESENTATION.

The Eleventh Circuit's approval of James Adams' capital sentencing trial and resulting death sentence--over his claim that counsel provided ineffective assistance in that trial--is a grave miscarriage of justice. The sole reason for this injustice, as will be demonstrated in the succeeding paragraphs, is the uncontrolled and arbitrary operation of the principle that attorneys are presumed to be competent. The Court should grant certiorari to determine (a) whether this presumption should operate at all once "a defendant who claims his lawyer was ineffective [has] come forward with specific complaints about what the lawyer failed to do, and with specific arguments about how this failure hurt his case," Stanley v. Zant, 697 F.2d 955, 974 (11th Cir. 1983) (Arnold, J., dissenting), and (b) if it is to operate beyond this point, to what specific issues it applies and how, in relation to those issues, it can be rebutted.

To enable the Court to appreciate fully the gravity of the injustice done to Mr. Adams--and consequently the extraordinary importance of granting certiorari to rectify this injustice to him and to prevent its systematic recurrence in other cases--a review of Mr. Adams' sentencing trial is necessary. Through the incorporation of the evidence adduced in the guilt-innocence trial (T. 1175) and the presentation of additional evidence in the sentencing trial (T. 1163-1174), the state presented sufficient evidence to persuade the trial judge to find

> that aggravating circumstances, far outweighing any mitigating circumstances, are as follows:
>
> 1. The capital felony of murder in the first degree was committed by the defendant, James Adams, while he was under sentence of imprisonment for 99 years by the Court of General Sessions, Dyer County, Tennessee after a conviction on the charge of rape.

2. The defendant was previously convicted of a capital felony, same being the charge of rape above referred to and being a felony involving also the use or threat of violence to the person.

3. The capital felony of murder in the first degree was committed while the defendant was engaged in the commission of or in an attempt to commit the crime of robbery.

4. The capital felony of murder in the first degree was committed for the purpose of avoiding or preventing a lawful arrest.

5. The capital felony of murder in the first degree was committed for pecuniary gain.

6. The capital crime of murder in the first degree was especially heinous, atrocious, and cruel.

By his own admission the defendant was previously convicted of crimes on at least five occasions and the further undisputed evidence shows the defendant has a record involving crimes of violence; that he is an escapee of the State Prison System of the State of Tennessee and that the body of the victim was mutilated, mangled and disfigured unnecessarily.

(R. 84-85)[5] To counter the evidence of these aggravating factors, Mr. Adams' counsel declared, before the jury and the judge in open court, "We have no evidence." (T. 1175) While counsel might have qualified this declaration by saying, "we have no new evidence"--followed by an explanation that the evidence of guilt left enough room for doubt about Mr. Adams' actual guilt that death should not be imposed [see Smith v. Balkcom, 660 F.2d 573, 580-581 (5th Cir. 1981) (Unit B) (recognizing that residual doubt about guilt, which is insufficient to be "reasonable" doubt and foreclose conviction, can be a significant mitigating factor)]--counsel did not do so. Instead, he informed the jury and the court that he had no evidence to present, and thereby gave the impression that there was no mitigating evidence.

Shortly thereafter, counsel strengthened and reconfirmed this impression in his one-minute closing argument in support of why the jury should recommend life imprisonment. Far from being an argument in support of life, the argument was an apology to the court for having to ask for life in the face of such a

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5 By approving only the trial judge's finding of the aggravating circumstances enumerated as 1, 2, 3, and 6 in these findings, the Florida Supreme Court impliedly held that circumstances 4 and 5 should not have been found.

death-appropriate case. Counsel opened his argument by allying himself with the horror felt by the victim's wife and the outrage felt by the community at the homicide of such a prominent citizen. (T. 1179-1180) Counsel then referred to the wisdom of the legislature in providing for a death penalty and to the state's position and evidence supporting its position that Mr. Adams should appropriately be put to death under this statute. (T. 1180) Then, without any reference to evidence in support of the view that life imprisonment should be imposed, he concluded,

> ... I find it necessary to ask for you to consider that you save his life in spite of all this and let this man live, for no other reason than that he is a man.

(T. 1180)[6] Counsel thus gave the trial court no reason to impose life instead of death, conceded the strength of the reasons for imposing death, and apologetically, asked for the imposition of life despite there being no reason he could think of for doing so.

Not surprisingly (from a lawyer who would represent a capital defendant in this manner), when he was faced with a claim that the foregoing amounted to ineffective assistance in state post-conviction proceedings, Mr. Adams' trial counsel refused to cooperate with post-conviction counsel. Nonetheless, through the effort of the attorney who assisted trial counsel in the week before and the week of his trial, and who thereafter represented Mr. Adams in clemency proceedings, Mr. Adams demonstrated that much mitigating evidence was available and could have been presented in his case. Affirmatively he could have produced evidence of favorable character traits. Having been born into a black sharecropper's family in rural Tennessee, Mr. Adams grew up under desperately poor conditions and was uneducated and functionally illiterate as a result, but he nonetheless assumed the role of heading his parents' household and supporting his family at the age of sixteen and did so successfully for twelve years thereafter (until he was imprisoned for the Tennessee rape charge). (PCT. 25-26, 30-31) During this time and after, Mr. Adams was an active church member with a special interest in

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6 The entire closing argument is set forth in the Statement of Material Facts, supra.

counseling children. (PCT. 31) By way of mitigating the effect of the aggravating factors against him, he could also have presented considerable evidence. He could have shown that his conviction for rape was, in all likelihood, unconstitutional -- having been obtained, as it was, for the rape of a white woman through a racially segregated, highly prejudicial proceeding, involving a segregated courtroom, an all-white jury, and the continuous highly visible confinement of Mr. Adams in shackles throughout the trial (without cause, because of a routine practice). (PCT. 20-21, 27) He could have shown that during the course of his ten-year incarceration for this charge, he became a trustee at a correctional facility for young women, and that his escape from custody in Tennessee involved no violence but simply his driving a truck, which he was, as a trustee, authorized to drive, away from this institution. (PCT. 26-27) Finally, he could have shown that, notwithstanding his trial testimony that he had been previously "convicted of a crime....[m]aybe five or more times" (T. 926), he had been convicted only three previous times--one of which was the rape conviction, and the other two of which (misdemeanors) were constitutionally invalid because they were uncounselled. (PCT. 18, 26)

The assistant counsel who testified about the post-trial investigation in which he unearthed all of this evidence further testified that trial counsel's file included <u>nothing</u> that would indicate trial counsel's investigation of, or even awareness of, this evidence. (PCT. 23-32) When asked what the trial file revealed as to any investigation of mitigating evidence that could be presented in Mr. Adams' sentencing trial, this attorney testified as follows:

> There were references to his wife here in town and some of the neighbors and their recollections of his behavior in the neighborhood for the approximately one year that he lived here prior to this trial. There was also a reference in the trial file to the fact that his wife knew his entire background. There were also indications during the interview of several of the state's witnesses, who were also his former employers, as to the potential for presenting evidence as to his fairly favorable work habits and I believe there were at least two previous jobs that were mentioned in the file, during the investigation of the case, that could have been used.

(PCT. 23) This was all that the file revealed as to potential mitigating evidence, but counsel noted that the file did not in any way refer to these matters as "mitigating evidence" or as "penalty phase" matters. (PCT. 24)

To avoid finding counsel ineffective on this record, the Eleventh Circuit utilized two presumptions derived from the general presumption that lawyers represent their clients effectively. First, the court presumed, without explicitly saying so, that counsel always conduct reasonably substantial ("adequate") investigation of plausible defenses. Nothing but such a presumption can explain the court's analysis of the "investigation" issue here:

> Adams has failed to establish that the decision to ask the jury for mercy reflected less than reasoned professional judgment. Adams did not call trial counsel to testify at the state hearing and gave no indication to the district court as to how trial counsel would testify at any district court hearing. Support counsel did testify before the state court that the trial file revealed no specific investigation into certain matters, such as Adams' work record, church activity and lack of education, but acknowledged that the file showed counsel had interviewed Adams' wife, neighbors and former employers. Notes in the file indicated the wife knew Adams' background completely. In short, there is no basis in this record for finding that counsel did not sufficiently investigate Adams' background.

(App. 3a-4a) (emphasis supplied). Even though the testimony of "support counsel" is inaccurately recounted here--by omitting reference to most of the mitigating evidence, summarized supra, which support counsel discovered and which was not reflected in the trial file--the court nonetheless at least recognized that the file lent support to the contention that there had been "no specific investigation into certain matters...." Further the court recognized that there had been some investigation of potential sources of mitigating evidence. With the facts thus showing some lack of investigation, as well as some preliminary investigation of material facts and sources of material facts, the court nonetheless concluded that "there is no basis in this record for finding that counsel did not sufficiently investigate Adams' background." (Id.) (emphasis supplied). Put another way, the record failed to show conclusively that counsel did not

conduct an adequate investigation--despite evidence that there was "no specific investigation into certain matters"--because there was an underlying, unspoken presumption that counsel will always conduct an adequate investigation. [7]

Second, the court presumed that trial counsel's decision not to present any mitigating evidence was tactical, and--since it was based upon adequate investigation (by virtue of a previous presumption)--was not ineffective.

> Assuming counsel's decision to forego presenting evidence of Adams' background was one of tactics, it does not appear to have been patently unreasonable. As the district court noted, counsel may have feared that if he presented evidence about defendant's background, the state could have refuted it by calling attention to damaging evidence in the record. For example, if counsel had offered evidence of Adams' family life, the state could have emphasized that Adams was separated from his wife at the time of the murder because of his relationship with a sixteen-year old girl. Similarly, if counsel had presented evidence of Adams' religious devotion, the state could have noted that he spent the Sunday before the Monday murder gambling. Counsel could have reasonably decided that raising Adams' background might do more harm than good, and that the best strategy was to ask for mercy. See Stanley v. Zant, 697 F.2d 955, 965 (11th Cir. 1983).

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[7] To corroborate the operation of this presumption here, compare King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), where this presumption was not applied. In King, the petitioner made the same claim of capital sentencing trial ineffectiveness as Mr. Adams. The record underlying this claim was the following: (a) trial counsel moved for a one-day continuance of the penalty trial in order to discuss the proceeding with his client and to "speak to possible defense witnesses"; (b) the motion was denied, but defense counsel presented the testimony of one character witness anyway, referred the jury to mitigating aspects of the guilt phase testimony, and informed the jury of King's former attorney's favorable view of King's character; (c) in post-conviction proceedings, King demonstrated the availability and testimony of additional character witnesses who were asked to be at trial by defense counsel but who did not testify. Id. at 1490. In effect, therefore, King's record lent even greater support than Mr. Adams' record to the conclusion that counsel had reasonably investigated mitigating evidence--if a presumption that counsel had done so were to be applied. Counsel there had obviously investigated mitigating evidence, produced such evidence, and had available witnesses he did not call. Nonetheless, the court found upon this record precisely the opposite: the court found that "[t]here are indications in the record that counsel failed to conduct an exhaustive investigation for potential mitigating evidence," id. (emphasis supplied), and upon this basis subsequently held counsel ineffective, in part for his failure to investigate, id. at 1490-1491. Accordingly, a presumption of adequate investigation had to be operative in Adams--in order to defeat his claim of inadequate investigation--for the evidence of failure to investigate available mitigating evidence was greater in Adams than in King. The disparate results in these two cases cannot be explained in any other fashion.

(App. 4a).

The Eleventh Circuit's analysis in Adams thus approved capital sentencing trial representation in which counsel will be presumed to have acted reasonably and provided effective assistance even though (1) he has neither presented nor drawn the sentencer's attention to available, substantial mitigating evidence; (2) he has argued to the sentencer that while death seems appropriate, he is obliged nonetheless to ask the jury to impose life though he can think of no factual reason to do so; and (3) he has not testified in subsequent post-conviction proceedings as to why he pursued this line of defense.

This result, as well as the reasoning in support of this result, has created conflicts concerning the proper analysis of claims of ineffective assistance of counsel within the Eleventh Circuit and between the Fifth, Eleventh and Eighth Circuits which this Court should resolve. These conflicts include the following:

FIRST, whether the presumptions that attorneys conduct reasonably substantial investigation and take action based upon strategic choices have a proper role at all in the analysis of a claim that counsel has provided ineffective assistance in connection with a capital sentencing proceeding. While Mr. Adams' case is unique in the Fifth or the Eleventh Circuits insofar as the presumption of adequate investigation has been applied, both Circuits have expressly held that even if a lawyer fails to conduct a substantial investigation into a plausible line of defense, they will "presume, in accordance with the general presumption of attorney competence, that counsel's actions [thereafter] are strategic." Washington v. Strickland, 693 F.2d 1243, 1257 (5th Cir. 1982) (Unit B) (en banc), cert. granted, ___U.S.___, 103 S.Ct. 2451 (1983). Accord, Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). This presumption can be rebutted "when trial counsel testifies credibly at an evidentiary hearing that his choice was not strategic, ... or when certain of counsel's actions do not conform to a general pattern of a rational trial strategy." Washington, 693 F.2d at 1257-1258. Accord, Stanley, 697 F.2d at 966.

The Eighth Circuit has impliedly rejected the use of either of these presumptions in the analysis of capital sentencing trial claims of ineffective assistance in Pickens v. Lockhart, 714 F.2d 1455 (8th Cir. 1983). Faced with a district court decision denying a claim of ineffective assistance for failure to present any mitigating evidence due to the district court's presumption -- without any testimony from trial counsel to support it--that the decision not to present such evidence was strategic, the Eighth Circuit flatly disapproved this method of analysis:

> We cannot view the record to support such a conclusion. Given the severity of the potential sentence and the reality that the life of [trial counsel's] client was at stake, we find that it was incumbent upon Pickens' counsel to offer mitigating proof. There exists no indication in the record that [trial counsel] made any tactical decision; it appears much more likely that he abdicated all responsibility for defending his client in the sentencing phase. We cannot view such an abdication as meeting the level of effective assistance required under the Sixth Amendment.

714 F.2d at 1467 (emphasis supplied). By requiring that the record disclose the tactical basis for the failure to present mitigating evidence--and presuming no tactical basis if it does not--the Eighth Circuit has squarely rejected the presumption which the Fifth and Eleventh Circuits utilize (which presumes a tactical basis for action unless the record contradicts the presumption). It has accordingly, shifted the burden to the state to put on evidence that what appears to be ineffective assistance was in fact a reasonable trial strategy.[8]

SECOND, if presumptions of attorney competence are permissible, whether the presumption that counsel always conduct adequate pretrial investigations should be permitted. There is clear conflict within the Eleventh Circuit concerning the utilization of this presumption. As previously noted, this presumption was applied in Mr. Adams' case, but it was not

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[8] This view is further confirmed by Judge Arnold's joining the majority opinion in Pickens. Judge Arnold sat by designation on the Eleventh Circuit panel which decided Stanley v. Zant, supra. However, Judge Arnold filed a dissenting opinion in Stanley sharply disagreeing with the utilization of the presumption of trial strategy. Judge Arnold opined that "[i]t is not asking too much, when life is at stake, to require the State or counsel himself to explain a choice to present no evidence in mitigation." 697 F.2d at 974-975 (emphasis in original). Pickens embodies the rule advocated In Judge Arnold's Stanley dissent.

applied in the nearly identical case of King v. Strickland, supra. See n.7, supra. As illustrated by these two cases, the consequences of the utilization or non-utilization of this presumption are extraordinary. In King, where the presumption was not utilized, the court held that "counsel failed to conduct an exhaustive investigation for potential mitigating evidence." 714 F.2d at 1490. As a result, the failure to present additional mitigating evidence, "[could] not be deemed a strategic decision...," id. (emphasis supplied), and the ineffective assistance claim was resolved in the capital defendant's favor. By contrast in Adams, where the presumption was utilized, the court held that counsel had conducted an adequate investigation of potential mitigating evidence (App. 4a), thereby bringing into play the presumption that counsel's decision "to forego presenting evidence of Adams' background was one of tactics." Id. With this, the court applied the most difficult of all tests for a habeas corpus petitioner to meet: "a strategic decision to pursue less than all plausible lines of defense...if counsel first adequately investigated the rejected alternatives...will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it." (App. 3a, 4a) Pursuant to this test, Mr. Adams' claim failed.[9] Since the presumption of adequate investigation thus produced opposite results in nearly identical cases, the propriety of its use must be resolved by this Court.

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[9] Even under this test, however, the claim should not have failed. The presumed reasonable basis for foregoing the presentation of mitigating evidence was the tendency of such evidence to invite the state to emphasize some negative aspects of Mr. Adams' character already in evidence: his gambling and his "running around" with a young woman not his wife. (App. 4a) However, the vast majority of the unpresented mitigating evidence--see pp. 6-7, supra--would have been absolutely unaffected by "emphasis" by the state of this evidence. The unpresented evidence focused instead upon Mr. Adams' overcoming extraordinary odds to become a responsible, dependable adult from the age of 16 on (a trait recognized even by the prison authorities in Tennessee) and upon the mitigating aspects of the aggravating factors lined up against him. In no fashion would this evidence have been "refuted" by the "damaging" evidence of gambling and "running around." Moreover, when the failure to present the available evidence is viewed in this light and is coupled with counsel's affirmatively damaging closing argument--a "contextual" view which the Eleventh Circuit failed to undertake--the "patently unreasonable" strategic choice of counsel not to present mitigating evidence becomes clear.

THIRD, if presumptions of attorney competence are permissible, whether the presumption that counsel's actions are strategic must be tested by the entirety of the record or can be tested instead by limited reference to selected portions of the record. As previously noted, both the Fifth and Eleventh Circuits have held that the presumption that counsel's actions are strategic can be rebutted, when counsel testifies that they were not strategic or "when certain of counsel's actions do not conform to a general pattern of a rational trial strategy." Washington v. Strickland, supra, 693 F.2d at 1258. Accord, Stanley v. Zant, supra, 697 F.2d at 966 ("where the circumstances clearly show that counsel's failure to offer mitigating evidence could not have been based on reasonable strategy"). When testing counsel's actions in Mr. Adams' case against a "general pattern of a rational trial strategy," however, the Eleventh Circuit did not examine the entire record. It examined only that evidence in the record which might have become more damaging if counsel had presented mitigating evidence, concluding that the decision to "forego" mitigating evidence was, in context, part of an overall rational strategy. (App. 4a) Had it examined the entire record, however, the court could not have reached this same conclusion, for it would necessarily have faced counsel's seriously damaging closing argument. In two other cases, King v. Strickland, supra, and Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), the court has recognized that a damaging closing argument can turn an otherwise proper strategic choice not to present mitigating evidence into an ineffective strategy, because

> a vital difference exists between not producing any mitigating evidence and emphasizing to the ultimate sentencer that the defendant is a bad person or that there is no mitigating evidence.

Douglas, at 1557. Such a closing argument makes the finding of ineffectiveness "[cry] out from a reading of the transcript." Id. Thus, only because the court in Mr. Adams' case refused to review counsel's "no evidence strategy" in light of counsel's overall sentencing trial effort on behalf of Mr. Adams did it reach the result it did. Accordingly, the scope of counsel's

effort against which his choice not to present mitigating evidence must be tested is the final issue in need of resolution by this Court.

While the Court's grant of certiorari in Washington v. Strickland, supra, may include a resolution of these issues regarding the proper use of presumptions in the analysis of ineffective assistance of counsel claims, it also may not resolve these issues. As framed, the questions presented by Washington focus on the degree of prejudice which must be shown in order for an ineffective assistance claim to succeed. Nonetheless, as powerfully demonstrated by Mr. Adams' case, the presumption issues are just as much in need of resolution by this Court as is the prejudice issue. For this reason, justice demands that the issues be resolved--in one case or the other--and that the egregious injustice done to Mr. Adams be corrected, by granting his petition for a writ of certiorari.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE LOWER COURT'S APPROVAL OF THE FELONY MURDER AGGRAVATING CIRCUMSTANCE IN THIS CASE DIRECTLY CONFLICTS WITH THIS COURT'S RECENT PRONOUNCEMENTS IN ZANT V. STEPHENS CONCERNING THE NECESSARY FUNCTION OF STATUTORY AGGRAVATING CIRCUMSTANCES.

The Eleventh Circuit correctly recognized that Mr. Adams was indicted for and convicted only of felony murder (App. 4a). The state sentencing court relied upon felony murder as an aggravating circumstance to support the death sentence. But, in Florida as elsewhere, individuals convicted of felony murder, as distinguished from premeditated murder, are deemed less deserving of death. Yet the sentencing court in Mr. Adams' case used felony murder as the basis of an aggravating circumstance. Thus, the sentencing court "attached the 'aggravating' label ... to conduct that actually should militate in favor of a lesser penalty." Zant v. Stephens, ___U.S.___, 103 S.Ct. 2733, 2747 (1983). This case should be remanded for reconsideration in light of Zant v. Stephens.

As the statement of the facts in this petition makes clear, this was from start to finish a felony murder case only. The indictment was based solely upon a theory of felony murder and

not upon any theory of premeditated intent to take a human life. The state's case at trial was grounded exclusively on a theory of felony murder. In his closing argument, the prosecutor stated that the only issue in the case was whether the deceased was killed during a robbery (T. 1050), thus relying solely upon felony murder. During the jury charge conference, both the prosecutor and the judge agreed that there was "no premeditation involved in this thing" (T. 1004), and the prosecutor further underscored that this was a case where "premeditated intent or design is not involved" (T. 1006). Thus, it was agreed that the jury would only be instructed on felony murder (T. 1015) and in fact the only ground on which the jury was instructed that it could return a verdict of guilty of first degree murder was upon a finding that Mr. Adams had killed the deceased during the course of a robbery "even though there is no premeditated design or intent to kill" (T. 1126, 1145). In light of these instructions, the jury's general verdict (T. 1151) could only have been based upon a finding of felony murder. Moreover, the sentencing judge's findings in support of the death sentence do not include any finding that the killing was deliberate. The Florida Supreme Court offered the death sentence on the basis of felony murder, Adams v. State, 341 So.2d 765, 767-68 (Fla. 1977), and the Eleventh Circuit affirmed the denial of habeas corpus relief despite treating the homicide solely as a felony murder (App. 4a-5a).

The element of felony murder in this case is a mitigating, not an aggravating, circumstance. In Florida, as in most states, those convicted of felony, rather than premeditated, murder are considered less deserving of the death penalty. See generally Dressler, The Jurisprudence of Death By Another: Accessories and Capital Punishment, 51 U. COL. L. REV. 17 (1979); Note, The Constitutionality of Imposing the Death Penalty for Felony Murder, 15 U. HOUSTON L. REV. 356 (1978). The Florida Supreme Court stated in McCaskill v. State, for example, that juries "have been reluctant to recommend the imposition of the death penalty in all but the most aggravated [robbery-murder] cases despite general knowledge and concern of the citizenry over the

substantial increase in crime." 344 So. 2d at 1280. Similarly, the Arizona Supreme Court has held that "the giving of a felony murder instruction may be considered as a mitigating circumstance." State v. Schad, 633 P.2d 366, 383 (Ariz. 1981), cert. denied, 455 U.S. 983 (1982). See also State v. Gillies, 662 P.2d 1007, 1020-22 (Ariz. 1983); State v. Zarogoza, 654 P.2d 22, 29 (Ariz. 1983). It was not considered as a mitigating circumstance in this case by the judge or jury -- the jury was not instructed that it could consider the lack of intent as a mitigating factor.

It is important to define what Mr. Adams means by "felony murder." On the one hand, the term embodies our society's judgment that deliberate, intentional and premeditated murders, when they occur in the course of certain felonies, may justify imposition of the death penalty. This is the principle embodied in Florida's felony murder aggravating circumstance, Fla. Stat. §921.141 (6)(d), approved by this Court in Proffitt v. Florida, 428 U.S. 242 (1976). But the meaning of "felony murder" relevant to this case is quite different. Under this variant of the felony murder doctrine, one whose conduct brought about an unintended death in the commission of a felony is guilty of murder. See generally LaFave & Scott, Handbook on Criminal Law, 545-561 (1972). In this sense, a finding of felony murder is a mitigating circumstance because it is based on a legal fiction: the notion that the specific intent for the underlying felony may be transferred so as to satisfy the specific intent requirement of first degree murder. Such a fiction may generally benefit society by deterring those engaged in felonies from killing recklessly or negligently. But such fictions will not do when the issue is life or death. This Court recognized as much in Enmund v. Florida ___U.S.___, 102 S.Ct. 3368 (1982). Enmund was an aider and abettor only to the underlying felony; he did not intend the murder that ensued. This Court surveyed the felony murder statute nationally and considered that our society considers death a disproportionate penalty for crimes similar to

Enmund's. "American criminal law has long considered a defendant's intention -- and therefore his moral guilt -- to be critical to the degree of his criminal culpability." Id. at ___, 102 S.Ct. at 3378.

Enmund makes clear that the "intent" at issue in deciding who dies is the real intent possessed by the defendant at the time of the crime, not some intent artificially manufactured to satisfy the felony murder doctrine. The facts of this case present a graphic illustration of why felony murder should, in the sense of non-premeditated murder, be deemed a mitigating, rather than an aggravating circumstance. The crime in Mr. Adams' case was a non-deliberate killing. The perpetrator entered the residence unarmed. At the time the perpetrator entered, no one was at home (T. 267, 324-25, 442-46). Sometime later, the deceased returned and came upon the perpetrator (T. 241, 324-25). A struggle then ensued in which the deceased received injuries from blows by a fireplace poker, which caused his death the next day. The deceased was conscious at the time he was found, which was shortly after the perpetrator departed (T. 447-48).

Petitioner has shown that (1) he was indicted, tried, convicted and sentenced on the basis of felony murder alone; (2) in Florida, as elsewhere, felony murder, as opposed to premeditated murder, is deemed less deserving of death; (3) but in this case felony murder formed the basis of an aggravating circumstance. The danger foreseen by this Court in Zant v. Stephens came to pass here: the sentencer "attached the 'aggravating' label to conduct that actually should militate in favor of a lesser penalty." ___U.S. at ___, 103 S.Ct. at 2747. This case should be remanded for reconsideration in light of Zant v. Stephens.

III. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER FLORIDA'S HAPHAZARDLY APPLIED PROCEDURAL DEFAULT RULE CAN BAR FEDERAL HABEAS CORPUS REVIEW OF CAPITAL SENTENCING ISSUES.

The jury instructions at Mr. Adams' capital sentencing trial, which merely tracked the language of the Florida statute, could have led a reasonable juror to believe that he or she was

limited to considering only statutory mitigating circumstances, in violation of the requirement of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982) that the sentencer consider all relevant mitigating evidence. This reasonable construction of the court's charge would have precluded the consideration of significant factors in mitigation. Mr. Adams raised this issue in federal habeas corpus proceedings relying primarily on the controlling decision in Washington v. Watkins, 655 F.2d 1346, 1367-1368 (5th Cir.), reh. den., 662 F.2d 1116 (5th Cir. 1981), cert. den., 456 U.S. 949 (1982). The Court of Appeals, however, rejected this claim, solely on procedural grounds, holding that Mr. Adams' procedural default in the state courts[10] precluded review because he failed to demonstrate "prejudice" as required by Wainwright v. Sykes, supra. (App. 6a-7a)

Certiorari should be granted on this issue to resolve an extraordinarily important question pertaining to the application of Wainwright v. Sykes. Florida applies its procedural default rules to the review of capital sentencing issues in a haphazard, fundamentally inconsistent manner -- reviewing in one case the merits of an issue despite a procedural default in raising it and in the next, raising the very same issue, declining to review the issue on the merits because of a procedural default. Because the review of a capital sentencing issue on the merits in federal court can mean the difference between life and death, certiorari should be granted to decide whether Florida's application of its procedural default rules to capital sentencing issues can bar review of those issues in federal court.

The application of the procedural default principles of Wainwright v. Sykes is warranted only if the state courts have rejected a claim "on the basis of an independent and adequate state procedural ground that bars the federal courts from addressing the issue on habeas corpus." County Court of Ulster County v. Allen, 442 U.S. 140, 148 (1979). Under Wainwright v. Sykes the failure to raise a claim in the manner and at the time

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[10] Mr. Adams "did not object to the instruction as required by Fla.R.Crim.P. 3.390 (d)." (App. 6a)

required by the state law, which results in the state courts' refusal to entertain the merits of the claim, is such an "independent and adequate state procedural ground." However, if the procedural default rule is followed in one case but not in another raising the same issue in the same "default" posture, the refusal to review the issues in the first case for procedural default cannot be an "independent and adequate state procedural ground." In that case, the procedural default "rule" is merely a device by which the state court can turn on or off at will its receptivity to constitutional claims. Barr v. City of Columbia, 378 U.S. 146, 149-50 (1964). See also NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458 (1958). This is precisely the case with Florida's procedural default "rule."

In Straight v. Wainwright, 422 So.2d 827 (Fla. 1982), the defendant raised the very same instructional issue in the very same procedural posture as that presented by Mr. Adams. There, however, the Florida court did not refuse to entertain the issue because of the defendant's failure to object to it at trial. Rather, it entertained the issue on the merits without even the slightest reference to Straight's procedural default. Straight involved an appeal of the denial of a motion for state post-conviction relief, coupled with an original petition for a writ of habeas corpus in the Florida Supreme Court raising the ineffective assistance of former counsel on the direct appeal. In his original petition for a writ of habeas corpus, Straight asserted that the failure of his former counsel to raise the instructional issue on direct appeal denied him the effective assistance of counsel. 422 So.2d at 829-830. In his post-conviction proceeding appeal, Straight also raised the jury instruction issue on its merits. 422 So. 2d at 831. The Florida Supreme Court reached and denied the ineffective assistance claim, and it also entertained and decided the merits of the claim as raised in the Rule 3.850 proceedings, with no reference at all to Straight's procedural default:

> **Rule 3.850 Appeal**
>
> **Appellant argues that the imposition of the sentence of death upon him was violative of the Eighth and Fourteenth Amendments to the United States Constitution in that the instructions to**

> the jury had the effect of restricting mitigating considerations to the statutory mitigating circumstances. Appellant cites Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978), for the proposition that such restrictive instructions may render a death sentence violative of the Eighth Amendment.
>
> As we stated above in responding to the argument on ineffective appellate counsel, this contention is without merit. Our capital felony sentencing law and jury instructions based thereon do not limit consideration to statutory mitigating circumstances. See Peek v. State, 395 So.2d 492 (Fla.), cert.denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981); Songer v. State, 365 So.2d 696 (Fla. 1978) (on rehearing), cert.denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979).

422 So.2d at 831.

The absolute inconsistency in the Florida Supreme Court's application of Florida's procedural default rule, as illustrated by the court's treatment of this issue in Straight, is by no means rare. It has occurred with such frequency in the Florida court's treatment of capital sentencing issues that this Court must recognize and rule that there is no procedural default rule with respect to capital sentencing issues in Florida that can serve as an "independent and adequate state procedural ground" under Wainwright v. Sykes.

The opinions of the Florida Supreme Court in the Rule 3.850 appeals of capital defendants over the past four years reveal an almost pathological approach-avoidance conflict to the procedural default rule. In some Rule 3.850 cases that have raised errors in the consideration of aggravating and mitigating circumstances or in the scope of the circumstances considered, the Florida court has flatly refused to reach the merits of the issues presented because of procedural default. See Alvord v. State, 396 So.2d 184 (Fla. 1981); Smith v. State, 400 So.2d 956, 958-959 (Fla. 1981); Goode v. State, 403 So.2d 931, 932 (Fla. 1981); Dobbert v. State, 409 So.2d 1053, 1058 (Fla. 1982); Demps v. State, 416 So.2d 808, 809 (Fla. 1982); Songer v. State, 419 So.2d 1044, 1047 (Fla. 1982). In other cases raising the same issues in precisely the same posture, however, the court has reached the merits of the issues without any reference at all to a procedural default bar. See Douglas v. State, 373 So.2d 895, 896-897 (Fla. 1979); Adams v. State, 380 So.2d 423, 424 (Fla. 1980); Demps v.

State, supra, 416 So.2d at 809;[11] Ruffin v. State, 420 So.2d 591, 594 (Fla. 1982); Hall v. State, 420 So.2d 872, 873 (Fla. 1982). In some 3.850 cases raising errors in the penalty trial instructions concerning the scope of the aggravating or mitigating circumstances (as in Mr. Adams' case) or the manner in which aggravating and mitigating circumstances must be weighed against each other, the Florida court has also flatly refused to reach the merits of the issues because of procedural default. See Smith v. State, supra, 400 So.2d at 958-959; Goode v. State, supra, 403 So.2d at 932; Ford v. State, 407 So.2d 907, 908 (Fla. 1981); Antone v. State, 410 So.2d 157, 163 (Fla. 1982); Thomas v. State, 421 So.2d 160, 162 (Fla. 1982). Yet in other cases raising precisely the same instructional errors in precisely the same posture, the court has reached the merits of the issues without mentioning the procedural default "rule." See Hall v. State, supra, 420 So.2d at 874; Straight v. Wainwright, supra, 422 So.2d at 831. There can be only two explanations for this inconsistency: the Florida Supreme Court has acted arbitrarily or there is no procedural default rule with respect to capital sentencing issues.[12] Under either theory, the federal courts

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11 In Demps, the court refused on procedural default grounds to reach another similar issue respecting the scope of mitigating circumstances admitted into evidence.

12 The Florida Supreme Court has recently provided a partial, though Catch-22-like explanation for the inconsistency among these rulings. Since the effective date of the current death penalty statue, as this Court recognized in Proffitt v. Florida, the Florida court has consistently held that it has an independent duty to review the propriety of the imposition of the death penalty in connection with the direct appeal of each capital case. See, e.g. State v. Dixon, 283 So.2d 1 , 10 (Fla. 1973); Songer v. State, 322 So.2d 481 (Fla. 1975); Aldridge v. State, 351 So.2d 942, 944 (Fla. 1977); Hargrave v. State, 366 So.2d 1, 4-5 (Fla. 1979); McCampbell v. State, 421 So.2d 1072, 1074 (Fla. 1982). This independent duty requires the court to "examine the record to be sure that the imposition of the death sentence complies with all the standards set by the Constitution, the legislature and the Courts." Goode v. State, 365 So.2d 381, 384 (Fla. 1979). In the exercise of this independent duty on direct appeal, therefore, the court can and does review any issue concerning the penalty trial even though that issue has not been raised by the parties. See, e.g., LeDuc v. State, 365 So.2d 149, 150 (Fla. 1978); Goode v. State, 365 So.2d at 384; Jacobs v. State, 396 So.2d 713, 717-718 (Fla. 1981).

The catch is this: In two cases decided this year, the Florida court explained that the independent review conducted on direct appeal has sometimes included penalty trial issues which were not raised. Thus, when the petitioner raised such issues for the first time in Rule 3.850 proceedings, the court rejected them on the ground that they had already been determined -- albeit sua sponte and without direct reference -- on direct appeal. Palmes

should reach the merits of any capital sentencing issue for which state remedies have been exhausted because there is no "adequate" state ground.[13]

Accordingly, certiorari should be granted to resolve this critical question. The determination of a capital sentencing issue on its merits can mean the difference between life and death. Without a resolution by this Court, some capital defendants may live because in their cases, the Florida courts did not find a procedural default on issues raised for the first time in collateral proceedings. At the same time, others may die because in their cases, the Florida courts did find a procedural default on the very same issues raised in the very same procedural posture. The lightning-like arbitrariness of Florida's procedural default "rule" cannot therefore be sanctioned, because it results in the same random cruelty condemned in Furman v. Georgia, 408 U.S. 238 (1972).

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v. State, 425 So.2d 4, 6 (Fla. 1983); Armstrong v. State, 429 So.2d 287, 288-289 (Fla. 1983).

[13] Despite its en banc decision in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), upon which the Eleventh Circuit based its disposition of this instructional issue in Mr. Adams' case, the Eleventh Circuit (acting as Unit B of the Fifth Circuit) had previously recognized that "in death cases, the Florida Supreme Court exercises a special scope of review enabling them to excuse procedural defaults." Henry v. Wainwright, 686 F.2d 311, 314 (5th Cir. 1982) (Unit B). This recognition, in part, led the court to reaffirm the propriety of its decision on the merits of the issue presented in Henry, despite a question concerning procedural default under Florida's procedural default rule. Thus, to the extent that the court, acting as the Fifth Circuit (Unit B), has already adopted, in Henry, the principle which Mr. Adams now urges this Court to consider, there is a conflict between "circuits" also in need of resolution.

CONCLUSION

For the reasons expressed herein, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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BY Richard H. Burr, III

Counsel for Petitioner

October 31, 1983

No. 83-5701

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JAMES ADAMS,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, etc.,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, JAMES ADAMS, who is imprisoned on Florida's Death Row, asks for leave to file the accompanying Petition for Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner proceeded in forma pauperis at all times in the state and federal courts below. Undersigned court-appointed counsel has at all times represented Mr. Adams. Petitionvr has attached hereto his affidavit in substantially the form prescribed by Fed. Rules App. Proc., Form 4, and the Rules of this Court.

Respectfully Submitted,

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BY Richard H. Burr III
RICHARD H. BURR, III
Of Counsel to the Public Defender

Counsel for Petitioner.

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IN THE

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Respondent.

****

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, JAMES ADAMS, being first duly sworn, depose and say that I am the petitioner in the above entitled cases; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [ ] No [✓]

a. If the answer is "Yes", state the amount of your salary or wages per month, and give name and address of your employer.

b. If the answer is "No", state the date of last employment and the amount of the salary and wages per month which you received. 1973, $400.00 per month

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or from self employment? Yes [ ] No [✓]
b. Rent payments, interest or dividends? Yes [ ] No [✓]
c. Pensions, annuities or life insurance payments? Yes [ ] No [✓]
d. Gifts or inheritance? Yes [ ] No [ ]
e. Any other sources? Yes [✓] No [ ]

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. Gifts from friends. Approximately $15.00 or less

3. Do you own cash, or do you have money in a checking or saving account? Yes [✓] No [ ] (Include any funds in prison accounts)

If answer is "yes", state the total value of the items owned. Prison Account, $100.00.

4. Do you own any real estate, stocks, bonds, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes [ ] No [X]

If the answer is "yes" describe the property and state its approximate value. _____

_____

5. List the persons who are dependent upon your support, state your relationship to those persons and indicate how much you contribute toward their support. None

_____

I understand that a false statement to any questions in this affidavit will subject me to penalties for perjury.

"I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on November 9 1983
(Date)

Donna Adams
(Signature)

STATE OF FLORIDA)

COUNTY OF BRADFORD)

JAMES ADAMS being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

Donna Adams
Signature of Petitioner

SUBSCRIBED and SWORN to before me this 9 day of November, 1983.

Bonnie Burnside
NOTARY PUBLIC

My Commission Expires: